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No. 88-486

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

PATRICK H. DIAMOND,

Petitioner,

v.

DAVID P. REYNOLDS,
REYNOLDS METALS COMPANY,

Respondents

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. RESPONDENT'S BRIEF SHOULD BE STRICKEN

The Court should strike the brief of the respondents, David P. Reynolds & Reynolds Metals, because of its numerous deliberate and material false statements of fact & law.

The Respondents say on page 6 of their brief:

> "The Second Amended Complaint . . . specifically disavows any nexus between the alleged predicate acts and petitioner's injury."

That this statement is false can be seen from the complaint (Petition, Ap. C). Nowhere does the complaint "specifically disavow any nexus" but the respondents go on, throughout the remainder of their brief, to construct a skyscraper of argument on a foundation of falsity.

Similarly, Respondents put forth on page 5 a materially false and misleading

statement of law. In fn. 4, the respondents after correctly recognizing their "twelve purported separate mail fraud violations", and after correctly recognizing that "the predicate acts alleged pleaded violations of the mail fraud statute" proceed to quote from a case Biesenbach v. Guenther, 588 F.2d 400, 402 (3d Cir. 1978), as one of a "legion" of cases, "refusing to find fraudulent the allegation that the defendants perpetrated a material omission". The respondents would lead the Court to believe that this is relevant law, but never disclose that Biesenbach did not have a single allegation of a "mail fraud violation" in it (emphasis supplied).

Similarly, see p. 7 of this reply brief, as to their altering the meaning of a quotation by omitting words that

would show the Court was speaking of standing under an entirely different part of §1962.

Similarly, see p. 17 of this reply brief, the respondents' citation of 3 cases, Sperber, Flip Side and Grantham as all "acknowledging" a proposition not even discussed by those Courts of Appeal.

The Respondents' brief should be stricken for these materially false statements of fact and law because:

> "A court should not have to pore over an extensive record as an alternative to relying on counsel's representations." In re Boucher, 837 F.2d 869, 871, (9th Cir. 1988).

This Court should be able to rely on counsel's obedience to Rule 3.3 of the ABA Model Rules of Professional Conduct:

> "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."
>
> "[With] the dramatic rise in litigation . . . tolerance of

> lawyers' misconduct is simply a luxury the federal court system can no longer afford." Eash v. Riggins Trucking, Inc., 757 F.2d 557, 565 (3d Cir. 1985).

II. PETITIONER HAS STANDING BECAUSE OF INJURY BY PREDICATE ACTS OF MAIL FRAUD

The respondents are incorrect; Diamond's injury did flow from their predicate acts of mail fraud, i.e., their fraudulent mailings to Robertshaw stockholders.

The RICO conspirators knew that Diamond was a member of the Board of Directors of Robertshaw when they committed their predicate acts of mail fraud by mailing false proxy statements to the Robertshaw shareholders (Complaint ¶12Ai, Bi, ¶¶32-34, 39, 41, 43). These proxy statements contained Diamond's name, biography, and in large letters on the cover of each said that they were mailed "By Order of the Board of Directors".

When the director Diamond became aware that the respondents were engaged in a conspiracy to defraud his shareholders, and were using false proxy statements with his name on them to accomplish their scheme, he objected with the result that the RICO conspirators fired him. Thus, Diamond's firing was a direct result of, and flowed from, the predicate acts of mail fraud; he responded, and indeed had no choice but to respond, to the mail fraud they were carrying out in his name, to protect his reputation, to avoid liability for the mail fraud, and to safeguard his shareholders from the mail fraud. Diamond's injury is much more closely related to the RICO violations than the injury to any of the victims in the examples of Justice Marshall on page 521-522 of Sedima, which all nine

Justices agreed would have RICO standing, see Sedima, fn. 15.

The Third Circuit's idea that an employee who was asked to join a mail fraud conspiracy against his shareholders but refused and was fired might have standing but that an employee, known to the conspirators as an honest employee and therefore not asked to join, who opposed the plan and was fired would not have standing makes no sense. What reason in the statute, case law or public policy could support greater protection for a "shady" employee than for an honest one? Respondents' Brief, p. 8.

III. RESPONDENTS AND THE COURT BELOW WOULD READ §1962(d) OUT OF THE STATUTE

Respondents try to sidestep the careful analysis of §1962(d) in Williams v. Hall, 683 F.Supp. 639 (E.D. Ky. 1988) by saying that Williams "is primarily

concerned with standing to sue under 18 U.S.C. §1962(d)" and that Sedima said standing is conferred by "injury flowing 'from the commission of the predicate acts'". Respondents' Brief p. 13 fn. 5.

First: Petitioner's Complaint does claim standing under §1962(d) (Complaint, ¶65, 66)

Second: Respondents omit the underlined words from Sedima: "recoverable damages occurring by reason of a violation of §1962(c) will flow from the commission of the predicate acts" and take out of context what Sedima said about §1962(c) so that it seems that the quotation were about §1962(d). (This unprofessional course of conduct has been pointed out in Sect. I as another reason why the Court should strike respondents' brief.)

Third: As Williams points out at 642:

> "The court believes that the Supreme Court . . . would follow the common law of civil conspiracy in determining standing under §1962(d)."
>
> "(L)iability for civil conspiracy is geared to damage caused by commission of overt acts done in furtherance of the conspiracy." P. 643 (emphasis supplied).

Although respondents would read §1962(d) out of the statute, Diamond's allegations of injury by a RICO conspiracy in violation of §1962(d) provide separate grounds for standing. RICO is a carefully crafted statutory scheme; §1962(d) reflects the fear of groups working for illegal ends, and makes it a violation of §1962 to conspire to violate §§1962(a), (b) or (c). Section 1964 imposes a civil liability on violators of any section of §1962, including 1962(d).

But the only way in which there can be injury by a conspiracy is by injury by an overt act. It is not the conspiracy itself but the overt acts done to further the conspiracy which cause the injuries which give rise to civil liability. Rutkin v. Reinfeld, 229 F.2d 248, 252 (2d Cir.), cert denied sub nom. Kaplow v. Reinfeld, 352 U.S. 844 (1956).

Therefore, since §1964 grants standing to those injured by a violation of §1962(d), it grants standing to those injured by an overt act to further the conspiracy. Diamond was fired (an overt act) to further the 1962(d) conspiracy to violate 1962(b) and (c), was therefore injured in his business and property, and has standing to recover under §1964.

IV. DECISION BELOW CONFLICTS WITH SEDIMA

The Second Circuit in Sedima had allowed standing only if the plaintiff

could "allege a 'racketeering injury' -- an injury different in kind from that occurring as a result of the predicate acts themselves. . ." Sedima, 473 U.S. 479, at 485.

When the Supreme Court expanded standing to those who had been injured "as a result of the predicate acts themselves", it did not take way standing from those with a "racketeering injury" who had previously had standing. See Sedima, 497, fn. 15, which criticizes the Second Circuit for having been too sparing with standing:

> "Even the court below was not that grudging. It would have allowed recovery for both the direct and the ultimate harm flowing from the defendants' conduct, requiring injury 'not simply caused by the predicate acts but also caused by an activity which RICO was designed to deter'." (emphasis supplied)

The Second Circuit agrees that both

those with the original "racketeering injury" and those with the new, injury by the predicate acts, have RICO standing, Bankers Trust Co. v. Rhoades, No. 1074, Slip Op. Oct 3, 1988, p. 6605:

> "(A)ll that is required is that plaintiff suffer injury in fact, see Sedima, (the only standing requirement under §1964(c) is that the plaintiff be 'injured . . . by the conduct constituting the violation')."
>
> "Significantly, this injury is not limited to damages suffered from the RICO violation as a whole, but also includes injuries suffered from each predicate act." (emphasis supplied)

The "damages suffered from the RICO violation as a whole" are the original "racketeering injuries". Sperber v. Boesky, 849 F.2d 60, 63 (2d Cir. 1988):

> "By damages caused only 'indirectly', we mean 'racketeering' injury, 'competitive' injury or injury caused by the total effect of the pattern of racketeering in the enterprise."

> "The [Sedima] majority evidently agreed that at least some kinds of indirect injury are recoverable since they stated that 'damages include, but are not limited to, the sort of competitive injury for which the dissenters allow recovery. [Sedima, fn. 15] Sperber at 63.
>
> "We therefore assume, without so holding, that all of Justice Marshall's plaintiffs [Sedima, p. 521-522] can recover." Sperber at 64.

"Indirect injury" means "racketeering injury" or "competitive injury", not indirect injury by the predicate acts as the respondents seem to think.

Respondents Don't Respond To Sedima Fn.15

Although the petition cites often Sedima, p. 521-522, and fn. 15, the respondents nowhere "respond". The Petition points out at least ten times that the clear language of Sedima, at 497, fn. 15, grants standing to those

with direct injury but doesn't take it away from those who had always had it, i.e., those with "racketeering", "competitive" or "indirect" injuries.

> "Such damages include, but are not limited to, the sort of competitive injury for which dissenters would allow recovery. See post, at 521-522." Sedima, p. 497.

This language, and indeed the rest of fn. 15, points out very clearly that RICO covers injuries "caused by an activity which RICO was designed to deter", i.e., "competitive injury", "racketeering injury" and "indirect injury".

Respondents never once were able to answer the clear language of fn. 15 of Sedima, although the petition cited and quoted it numerous times:

> P. 26 and p. 43: "'The Majority . . . agreed indirect injury (is) recoverable since . . . "damages include, but are not limited to, the sort of

competitive injury for which the dissenters allow recovery"' (fn. 15)"

P. 29: "'(T)he injurious consequences of the enterprise other than the injury directly attributable to the fraudulent acts themselves would be recoverable. See (fn. 15)"

P. 30: "'Sedima, (fn. 15) presumably . . . include(s) the "racketeering injury" concept adopted by the Second Circuit.'"

P. 40: "That the . . . decision conflicts with Sedima can be seen from . . . (fn. 15)"

P.43: "(A)ll nine justices agreed . . . 'racketeering injury', 'indirect injury', or 'competitive injury' . . . would continue to have standing, (fn. 15)".

P. 44: "Sedima . . . victims with direct injury would be compensable as well as victims with indirect injury whose compensability was unquestioned and assumed. Sedima, (fn. 15)".

P. 49: ". . . directly (and) indirectly injured . . . have standing (fn. 15)".

Similarly, respondent refuses to

look to Sedima pages 521-522 as Sedima fn. 15 directs to see who has RICO standing. The examples on p. 521-522, all nine justices agree, have RICO standing. This was pointed out in the petition at:

> P. 45: "This Court in Footnote 15 . . . said of damages recoverable under RICO: 'Such damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery. See post at 521-522.'"
>
> P. 46: ". . . p. 521-522 . . . illustrate the . . . injuries . . . all nine justices agreed were recoverable under . . . footnote 15."
>
> P. 55: ". . . (E)xamples in Sedima, p. 521-522 that all nine justices felt had RICO standing, see footnote 15, shows standing to be allowed by Sedima to those much further from the activities of the racketeers." (emphasis added)

The respondents are unable to respond to Footnote 15of Sedima which continue to accord relief to victims with

"racketeering 'injury", "competitive injury" and "indirect injury" after Sedima, and to pages 521-522 of Sedima which give examples of victims with RICO standing whose injuries are much more remote from the RICO violations than were the petitioners'.

V. SERIOUS CONFLICT EXISTS AMONG NINE CIRCUITS

As quoted above, Sedima, fn. 15, Sperber, p. 63, and Bankers Trust, p. 6605, all acknowledge that there continues to be standing for those with "Racketeering Injury", i.e., injury "caused by the total effect of the pattern of racketeering". Sperber, p. 63, and those with injury "suffered from the RICO violations as a whole . . ."

Respondents at p. 13 make the astounding statement that there is no conflict among the circuits, astounding

because the Courts of Appeal feel there is conflict, see Petition p. 14-34, and, e.g., National Enterprises v. Mellon Financial Services, 847 F.2d 251, 253 (5th Cir. 1988).

> "whether an indirect injury is sufficient to constitute standing in a RICO action is a contested question among the federal courts". (emphasis supplied)

In an attempt to prove their contention the respondents, at p. 15, cite cases that they say "acknowledge that the proper inquiry . . . is whether the alleged injury flows from the commission of the predicate acts . . ." but they then cite Sperber, p. 64, Flip Side, p. 1035, and Grantham & Mann, p. 606, which say no such thing.

Thus again petitioner respectfully refers the Court to Part I in which it is suggested that the Respondents' Brief be Stricken.

As to whether conflict exists among the Circuits, petitioner submits that the Court should look to the acknowledgment by courts that such conflict among the circuits exists, see, e.g., National Enterprises, supra, at 253, and to the cases, Petition, p. 14-34, or themselves. The Court should not rely on the brief of the Respondents.

VI. NO COLLATERAL ESTOPPEL

Respondents assert that the trial of a contract issue between Diamond and a non-party, Robertshaw, somehow estops Diamond from suing others, i.e., the RICO defendants for his injuries caused by their RICO violations. For collateral estoppel an issue must be both necessary and essential to the final judgment in the action. NLRB v. Masters Lock, 773 F.2d 77 (6th Cir. 1985); 1B Moore's Federal Practice ¶0.443 [5.-1] (2nd ed.

1987). The court in the contract case said that the only issue necessary and essential for judgment (see p. A23-24, Respondents' Brief), the pivotal question, was whether RMC actually gained control over ROB. The court specifically found that the existence or non-existence of a plan to acquire ROB stock was not necessary and essential to its judgment: "the Court need not determine whether such a plan in fact existed" (see n. 6 at A-11, Respondents Brief).

Respondents' assertion that RMC's lack of a plan to take over Robertshaw is proven by the fact that another company eventually acquired ROB is ludicrious. Respondents' brief, p. 3.

Because of the conflict among nine circuits on this important issue of standing for injury by racketeering activity, the failure of the Third Circuit to follow Sedima in this case, and the recurring nature of this fact pattern, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted

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